



## 7. LEGISLATION, LIABILITY, AND INSURANCE

Liability is an important area of concern in virtually all RWT projects, and the Grand Junction Trail is no exception. In the context of the Grand Junction Trail, liability refers to the obligation of the trail operator or owner to pay or otherwise compensate a person who is harmed through some fault of the trail operator or railroad. A recent nationwide study of RWTs, *Rails-with-Trails: Lessons Learned* (2002) provides much guidance concerning the limits of liability and ensuring user safety.

The Grand Junction Trail would be considered a shared-use corridor, and the relationship of the parties in a shared-use corridor will be influenced by which entity holds the dominant property interest. For many shared-use corridors it is the trail that is the incidental use and must take into consideration the interests of the primary user. This is true of the Grand Junction Trail, as the primary user of the rail corridor is CSX. In addition, there are other existing uses of the corridor, such as service access to MIT buildings, which need to be considered.

In addition to CSX and MIT, other landholders include the City and several individuals and companies. This is an atypical situation, as most RWTs are owned by one property owner, such as a railroad or a state agency. For the Grand Junction, the question of ownership transfer or acquisition of an easement with all the property owners presents a distinct challenge. To maintain greater control on use and operation of shared physical space, typically a license or lease agreement is negotiated detailing the development and operation of the trail. This is discussed in greater detail later in this chapter.

It is important to recognize the potential risks associated with human activity near moving trains. Given the possibility of an accident, however remote, it is understandable that primary property owners will want to shield themselves as best as possible from lawsuits.

### Overview of Concerns

These are the likely liability concerns about the intentional location of the trail near or on the active railroad corridor:

- The concern that the trail users might not be considered trespassers if CSX or MIT invites and permits trail use within a portion of their right-of-way, and if that were the case, the concern that the railroad or institution might therefore incur a higher duty of care to trail users than they would otherwise owe to persons trespassing on their corridor.

- The concern that incidents of trespassing might occur with greater frequency due to the proximity of a trail.
- The concern that trail users might be injured by railroad or MIT activities, such as an object falling or protruding from a train or from accidental exposure to hazardous materials.
- The concern that injured trail users might sue CSX or MIT even if the injury is unrelated to railroad operations.
- Concerns regarding the safety and security implications of creating a paved path with public access adjacent to a nuclear reactor (especially for MIT).

## **Definitions and Laws**

As the owners and occupiers of their rights-of-way, railroads and property owners have legal duties and responsibilities to persons both on and off their premises. The property owners have a duty to exercise reasonable care on their premises to avoid an unreasonable risk of harm to others on adjacent properties. Railroads may potentially be found liable if the use of their right-of-way creates an unreasonable risk to persons on an adjacent property such as through derailments or objects falling off the trains.

In most states, the duty of care owed to persons who enter another's property depends on whether the injured person is considered a trespasser, a licensee, or an invitee. A trespasser is a person who enters or remains upon land in possession of another without a privilege to do so, created by the possessor's consent or otherwise. A licensee or invitee is a person on the owner's land with the owner's permission, express or implied. Trespassers are due a lesser duty of care than invitees and licensees. In Massachusetts, property owners owe no special duty of care to persons trespassing on their premises, other than to refrain from intentional, harmful, or reckless acts.

Unique characteristics of the Grand Junction Trail that may affect the extent to which liability is potentially enlarged include:

- Ownership of land by multiple parties
- The narrow ROW of the corridor in certain segments
- The possible need to cross the railroad tracks in one or more places
- The possible co-location of the Urban Ring (MBTA) within the ROW

## **Available Legal Protections**

Potentially offsetting some or all of a railroad's increased liability attributable to a RWT are the State-enacted Recreational Use Statutes (RUSs). All 50 states have RUSs, which provide protection to landowners who allow the public to use their land for recreational purposes. A person injured on land made available to the public for recreational use must prove that the landowner deliberately intended to harm him or her. States created RUSs to encourage landowners to make their land available for

public recreation by limiting their liability provided they do not charge a fee. Railroad companies and institutions that agree to an RWT on their property would have limited liability due to these statutes.

In Massachusetts the following laws and statutes apply:

Recreational Use Statues (RUS)	Trail, Rails-to-Trails Program, Recreational Trails System, or Similar Statute	Government Tort Liability Act	Railroad Fencing Laws
Massachusetts General Laws Ann. Ch. 21 § 17C	Chapter 82 Section 35A	Mass. Ann. Laws Ch 258, § 1 et seq.  Tort Claims Act	Mass. Gen. Laws Ann. Ch. 160, § 93

**The General Laws of Massachusetts, Chapter 21, Section 17 covers:**

***Public use of land for recreational, conservation, scientific educational and other purposes; landowner's liability limited; exception.***

Section 17C. (a) Any person having an interest in land including the structures, buildings, and equipment attached to the land, including without limitation, wetlands, rivers, streams, ponds, lakes, and other bodies of water, who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefore, or who leases such land for said purposes to the commonwealth or any political subdivision thereof or to any nonprofit corporation, trust or association, shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of willful, wanton, or reckless conduct by such person. Such permission shall not confer upon any member of the public using said land, including without limitation a minor, the status of an invitee or licensee to whom any duty would be owed by said person.

(b) The liability of any person who imposes a charge or fee for the use of his land by the public for the purposes described in subsection (a) shall not be limited by any provision of this section. The term "person" as used in this section shall be deemed to include the person having an interest in the land, his agent, manager, or licensee and shall include without limitation, any governmental body, agency or instrumentality, nonprofit corporation, trust or association, and any director, officer, trustee, member, employee or agent thereof. A contribution or other voluntary payment not required to be made to use such land shall not be considered a charge or fee within the meaning of this section.

Chapter 21, Section 17 of the General Laws of Massachusetts contains very specific language regarding the legal positions of landowners and their responsibilities towards public users of the land. The statute indicates that **a property owner, that has an interest in the land who lawfully permits the use of the land by the public is not liable for any personal injury or property damage suffered by the user, as long as the property owner did nothing to intentionally harm the user. Furthermore,**

**the statute expressly limits the status of any member of the public by denying them the rights of either an invitee or licensee.**

### **The General Laws of Massachusetts, Chapter 82, Section 35A:**

Section 35A. The board or officers authorized to lay out highways or town ways may lay out, construct and maintain rail trails under the laws relative to the laying out, construction and maintenance of public ways. For purposes of this section, a rail trail shall mean property converted from the former use as a railroad right-of-way to a use as a publicly-owned, improved and maintained corridor for bicycle, pedestrian and other non-motorized public transportation, recreation and associated purposes. Rail trails may be laid out on property a city or town has acquired by fee, easement, lease, license or otherwise and may be subject to a reversion allowing the railroad company or authority to reclaim the property for rail purposes upon written notice. The owner of such reversion shall be exempt from liability for any claims associated with use of any such rail trail including claims for damages that may arise under section 15 of chapter 84 and section 38 of chapter 161A.

## **Liability Exposure Reduction Options**

Besides the federally mandated RUSs, there are additional available legal protections that reduce risk for adjacent property owners on RWT projects. Table 7-1 lists the options for additional measures.

Table 7-1. Liability Protections

OPTIONS	INTENT
Trail or rail-with-trail State statute	Create state legislation that limits liability
Trespassing legislation	Creates state legislation that specifically prohibits trail users from going onto railroad property outside of the trail
Insurance	
Transfer of ownership	The City enjoys additional limitations of liability for injuries occurring on City-owned property.

## **Property Control**

As noted earlier, the relationship of the parties in a shared-use corridor will be driven to a great extent by which entity holds the dominant property interest. The type of property control influences both the ease of implementing the project and the liability burden. There are three types of property arrangement: purchases, easement, and licenses.

### ***Acquisition***

To accommodate the concerns of property owners with respect to the location of a trail in an active right-of-way, the City of Cambridge could look to own the rail corridor itself. This internalizes the liability and coordination efforts. The City of Cambridge is treated differently from either CSX or other property owners due to its unique status as a sovereign entity. This option transfers basic liability to the City and would give the City the authority to locate the trail in the corridor. This was a

successful strategy for the City of Portland's Springwater on the Willamette Trail, for which the regional government, Metro, purchased the railroad corridor from a utility.

## Easements

In most instances, full ownership acquisition is not necessary for trail development, and, in many cases, is not really an option. Easements, which come in many forms, typically are acquired when the landowner is willing to forego use of the property and development rights (or, if zoning permits, transfer the development rights) for an extended period. The landowner retains title to the land while relinquishing most of the day-to-day management of the property. The trail manager gets sufficient control for trail purposes. The easement is attached to the property title, so the easement survives property transfer. Table 7-2 provides an overview of easement agreement issues.

Table 7-2. Easement Agreement

A model easement agreement should:
Guarantee exclusive use or uses compatible with RWT's activities.
Be granted in perpetuity.
Include air rights if there is any possible need for a structure.
Broadly define purpose of the easement and identify all conceivable activities, uses, invitees, and vehicular types allowed to avoid any need to renegotiate with fee interest owner in future.
State that all structures and fixtures installed as part of a trail are property of grantee.
Include subsurface rights for use by utility franchises.

It is also understood that major landowners – in this case, MIT and CSX primarily – would want an easement agreement to address issues on their side. Through cooperative negotiation, the following issues should be addressed in an easement agreement:

- Access needs related to maintenance, etc.
- Trail management plan
- Future improvements or modifications to the trail

## Licenses

A license is usually a fixed-term agreement that provides limited rights to the licensee for use of the property. Typically, these are employed in situations when the property cannot be sold (e.g. a publicly-owned, active electrical utility corridor), or the owner wants to retain use of and everyday control over the property. The trail management authority obtains permission to build and operate a trail. But it will have little control over the property, and may be subject to some stringent requirements that complicate trail development and operation. Table 7-3 provides an example of model license agreement language.

Table 7-3. License Agreement

A model license agreement should:
Provide an acceptable term length with an option to renew.
Identify all conceivable activities, uses, invitees, and vehicular types.
Provide clarity on maintenance responsibilities.
Specify limits on other uses of license property.

As with easement agreements, property owners would want a license agreement to address issues on their side. Through cooperative negotiation, the following issues should be addressed in a license agreement:

- Access needs related to maintenance, etc.
- Trail management plan
- Future improvements or modifications to the trail

## CSX

CSX has entered into agreements with local jurisdictions in the past on at least two occasions:

- Three Rivers Heritage Trail (Pittsburgh, PA) – CSX was concerned about liability and trespassing during the negotiations for this trail. CSX stipulated a number of design requirements as part of the agreement to grant right-of-way
- West Orange Trail (Winter Garden, FL) – CSX requested design approval before granting an easement for trail construction.

Both of these trails are urban trails similar to the Grand Junction Trail, with trail widths of 10-14' and a distance of 5-25' from trail to the track centerline. CSX operates freight rail in both corridors with minimal frequency.

## Risk Reduction

Visible signage, the use of physical barriers (such as fences, walls, vegetation, grade differences, and ditches) and good design are prudent liability protection strategies, as was explained in Chapter 4. Trail users should be warned at the trailhead and at any other entrances to stay off the railroad tracks, particularly if there are no physical barriers between the trail and the rail corridor. If the RWT is clearly designed to indicate that the railroad corridor is separate from the trail, trail users injured while within the railroad corridor or on the railroad tracks should be considered trespassers to which no special duty of care is owed. A well-designed RWT can actually reduce trespassing by channelizing pedestrian crossings to safe locations or by providing separation or security. A well-designed RWT should have the effect of reducing both trespassing, as well as risk of being held responsible for injuries sustained by trespassers.

## **Summary**

Successful trails can be planned and operated in relatively narrow ROW corridors. With the agreement of various landowners in the Grand Junction Corridor, a shared use path could be developed in this corridor. The elements that need to be carefully considered and planned are:

- Ownership: The City acquires land or an easement.
- Management: The City manages the trail.
- Design: Well-designed RWTs reduce liability exposure, trespassing, vandalism, and other impacts to the railroad and private property owners. Appropriate separation technique, setback distance, crossing design, and other elements all contribute to an effectively designed, user-friendly trail.
- Acquire the properties if possible or negotiate easement agreements with the relevant property owners. Ensure that the property owners are well aware of the strong Massachusetts laws limiting their exposure to liability.

